REDACTED – FOR PUBLIC INSPECTION

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July 31, 2007

BY HAND DELIVERY

FILED/ACCEPTED
JUL 31 2007
Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **REDACTED – FOR PUBLIC INSPECTION**
Stratos Global Corporation and Robert M. Franklin, Trustee
WC Dkt No. 07-73; Protective Order, DA 07-3344

Dear Ms. Dortch:

VIZADA Services LLC ("VIZADA"), by its attorneys and pursuant to the procedures established in the above-referenced Protective Order, released July 20, 2007, hereby submits two copies of the redacted version of its Reply in this proceeding. In the Reply we have redacted information for which confidential treatment was claimed by the Submitting Party, CIP Canada Investment Inc. Such redacted information is marked by black masking.

Please refer any questions regarding this matter to the undersigned.

Respectfully submitted,

Karis A. Hastings
Counsel for VIZADA Services LLC

Enclosure
cc: David Strickland
John Copes

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REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WC Docket No. 07-73
	)	
Stratos Global Corp. and Robert M. Franklin, Trustee	)	DA 07-2557
	)	
	)	FCC File Nos.:
	)	
Applications for Consent to Transfer of Control and Petition for Declaratory Ruling	)	ITC-T/C-20070405-00136
	)	ITC-T/C-20070405-00133
	)	ITC-T/C-20070405-00135
	)	SES-T/C-20070404-00440
	)	through -00443
	)	0002961737 and
	)	ISP-PDR-20070405-00006

To: The Commission

REPLY OF VIZADA SERVICES LLC

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July 31, 2007

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To: The Commission

REPLY OF VIZADA SERVICES LLC

VIZADA Services LLC ("VIZADA") submits this Reply to the Oppositions to Petitions to Deny filed by Inmarsat Finance III Limited (with its affiliates, "Inmarsat"), Stratos Global Corporation ("Stratos"), CIP Canada Investment Inc. ("CIP"), and Robert M. Franklin ("Franklin" or "Trustee") concerning the above-captioned applications (the "Applications") for consent to the transfer of control of Stratos. 1/

SUMMARY

The issue here is who will exercise *de facto* control over Stratos as a result of the proposed transactions. VIZADA demonstrated in its Petition to Deny that Inmarsat is the real-party-in-interest to the transfer of control of Stratos, and that Inmarsat should be seeking FCC

1/ For purposes of this Reply, the Oppositions are referenced respectively as the Inmarsat Opposition, the Stratos Opposition, the CIP Opposition, and the Franklin Opposition. In connection with the Applications, Stratos and Franklin (collectively, the "Applicants") filed a "Narrative" describing certain elements of the transaction, referred to herein as the "*Narrative*."

consent to acquire that control. Inmarsat has structured the transaction to obtain *de facto* control now, pending receipt of *de jure* control later at a time within its choice and convenience. However, Section 310 of the Communications Act cannot be side-stepped in this fashion. The Commission must either deny the Applications for failure to identify the real-party-in-interest or, alternatively, designate the Applications for hearing.

The Oppositions only underscore why the Applications cannot be granted as they stand. The parties speak inconsistently on basic points. For example, Inmarsat and Stratos state that the Trustee will control Stratos. But Mr. Franklin himself prudently states instead that "operational management and control" will remain with "Stratos' present management team" and with its "Board of Directors." 2/ CIP says the same.

In fact, the Oppositions do nothing to rebut the substantial evidence that Inmarsat itself will exercise *de facto* control over Stratos as a result of the transaction. As the Commission knows, *de facto* control is determined based on a review of the overall circumstances, and not any individual element. In this case, the parties do not materially challenge the central facts:

- Inmarsat organized this transaction, negotiated the purchase from the current Stratos shareholders, and considers itself the successful "bidder" for the company.
- Inmarsat is fully financing the transaction through the intermediary of CIP. The CIP principals do not claim to have made any material equity investment in CIP themselves and therefore have no material financial risk.
- Inmarsat's fixed-price option will allow it to take 100% *de jure* control of the Stratos stock with an additional payment of just 0.7% of the $250 million purchase price.
- Inmarsat is Stratos' primary wholesale vendor, and will be free to communicate routinely with Stratos management on operational matters.
- Inmarsat has made clear its desire and expectation to vertically integrate Stratos in its

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2/ *Compare* Inmarsat Opposition at 6 and Stratos Opposition at 4 *with* Franklin Opposition at 2 and CIP Opposition at 6.

business.

In sum, Inmarsat collectively will hold all economic interest in Stratos, as well as the ability and incentive to influence Stratos operations. That is the definition of *de facto* control, and Inmarsat clearly is a real-party-in-interest here.

The Applicants point to their proposed trust structure, but that is no answer to Section 310 of the Act. The trust does nothing to reduce Inmarsat's complete economic interest in Stratos, or Inmarsat's ability to influence the company through its wholesale vendor role. While the trust may nominally restrict communications among Stratos, CIP and the Trustee, it does not materially restrict direct communications between Inmarsat and Stratos.

Inmarsat and Stratos also contend that they could have proposed Inmarsat's direct acquisition of the company without violating the Commission's rules or the public interest. Even assuming that was true, it would not cure the Section 310 problem they have presented by keeping Inmarsat off the Applications here. VIZADA disagrees with the public interest argumentation of Inmarsat and Stratos, which rests on their own private interests and understates the significance of Inmarsat as a vendor of mobile satellite capacity. But in any event, the Commission does not even need to reach the public interest question given that Inmarsat has not yet filed an application as a real-party-in-interest as required by law.

That is the fundamental issue presented by the Applications and this "too clever by half" deal structure. Section 310 prohibits the transfer of control of a Commission licensee to the actual transferee without prior FCC approval, approval that has not been requested here. It is irrelevant that the Commission may feel familiar with Inmarsat from other proceedings and contexts outside the scope of this docket. Compliance with the statute and sound Commission precedent are at stake.

Importantly, the novel legal theory of the parties (if approved here) would equally allow some future, less-known entity to follow the same transaction structure and thereby side-step Commission review and the requirements of Section 310. Presumably the FCC would not agree that a third party from, let us say, a non-WTO country or a country presenting national security issues, could – without prior Commission review – fully finance the acquisition of an FCC-licensed broadcast or telecommunications company, obtain materially all of the economic benefit of the company through an assignable fixed price option (priced at a fraction of the company's value), and have regular and on-going communications with the company's management while enjoying the leverage of its role as a significant (and in this case the primary) wholesale vendor. Section 310 would require the proposed *de facto* owner to come forward in a formal application so that the FCC can determine in advance who that party is (including its foreign ownership) and analyze whether the party's *de facto* controlling position would be in the public interest. And Section 310 requires the same here of Inmarsat.

In short, compliance with the Communications Act is not optional. Inmarsat is free to file an application to take control of Stratos, and the Commission can evaluate such an application on its own terms. But the current application is defective and must be denied, or at a minimum designated for hearing.

I. THE OPPOSITION FILINGS ONLY UNDERSCORE THAT INMARSAT IS THE REAL-PARTY-IN-INTEREST HERE

A. The Parties Concede that this Transaction Is Structured to Address Private Contractual Obligations, But That Does Not Justify Evasion of Section 310

VIZADA has previously discussed statements in the Stratos *Proxy Circular*

making clear that Inmarsat 3/ was the party that initiated discussions with Stratos, negotiated the transaction, and developed the transaction structure. *See* VIZADA Petition at 7-9. None of the parties challenge this evidence. 4/

To the contrary, their most recent filings only bring out more clearly what is going on. Stratos makes this express when it tries to suggest that the deal has public interest benefits, albeit conflating them with its own private economic interests. According to Stratos, "the proposed transaction directly benefits Stratos's public shareholders by allowing them to sell their shares to the bidder willing to pay the highest price." 5/ That bidder is Inmarsat, as Inmarsat has acknowledged. 6/

Furthermore, Inmarsat has admitted why it is structuring the transaction in this novel way: to address a private commercial problem. Inmarsat wants to buy Stratos now, but is foreclosed from doing so until April 2009 by existing commercial contracts that prohibit it from

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3/ Inmarsat has appeared in this proceeding only in the name of Inmarsat Finance III Limited and claimed that VIZADA is "challenging Inmarsat's involvement as a financier of this transaction." Inmarsat Opposition at 2. However, this is incorrect, as Inmarsat knows. Inmarsat is not simply acting as a bank. The issue here, as VIZADA has discussed at length in its Petition to Deny, arises from all of the overall business relationships of Inmarsat (including its various affiliates) with Stratos. For example, if Inmarsat was not a major vendor to Stratos, this might be a different case. Notwithstanding its attempt to label itself as a mere "financier," Inmarsat does not deny its expectation to "vertically integrate" the Stratos business operations, and attempts to defend that plan. Inmarsat Opposition at 23-24.

4/ CIP and the Trustee defend their business experience in unrelated financial matters, which VIZADA has never challenged. However, they do not dispute Inmarsat's controlling role in the transaction as explained in the *Proxy Circular*.

5/ Stratos Opposition at 23. Of course, if the "highest price" was a sufficient "public interest" factor, any private transaction automatically would be in the public interest, and there would be no need for Commission review on this point.

6/ As Inmarsat's Chairman and Chief Executive Officer told the investment community, in a revealing slip when answering questions about the Stratos acquisition after it was announced: "We think we have put in a strong and fair bid [for the company]." Inmarsat plc Q1 2007 Earnings Call, May 14, 2007, CallStreet Transcript at 9 (www.CallStreet.com) (transcript available on request).

owning a retail distributor of its services. 7/ One might expect Inmarsat either to live by the terms of its contract or to renegotiate them. Neither of these commercial actions would implicate the Communications Act or the Commission's policies and rules.

However, Inmarsat is attempting to have its cake and eat it too, drawing the FCC into its creative scheme. It has structured this transaction to satisfy the demands of the current Stratos owners to be paid off now and relieved of their economic stake in the company. Inmarsat is funding the transaction through CIP pending expiration of its own contractual restraints. And Inmarsat feels secure in doing so because it will hold all the relevant strings over Stratos: through its financing, through its fixed price option, and through its wholesale supplier position and other lines of communication directly with Stratos. All that is left is for Inmarsat to exercise an option for *de jure* control of the Stratos stock at a fixed price of between $750,000 and $1 million – just 0.7% of the $250 million purchase price. *See* VIZADA Petition at 13-16.

Inmarsat's commercial agreements are not the Commission's concern. 8/ However, the Commission also must not allow Inmarsat to use those agreements as a justification for evading Section 310 of the Communications Act, let alone set a precedent that can be used in other future contexts. The Commission should require Inmarsat to come forward as the real-party-in-interest so that the requirements of Section 310 can be met.

7/ Inmarsat Opposition at 7; *see also* CIP Opposition at 8 ("The parties deliberately segregated beneficial and legal ownership of Stratos' shares, to comply with Inmarsat's Commercial Framework Agreement.").

8/ VIZADA takes no position here as to whether Inmarsat's transaction structure is consistent with its commercial obligations. Nor does the Commission need to decide here whether it would approve Inmarsat's acquisition of control of Stratos under Section 310. Our only point is that the Commission should address a full record based on an appropriate application where Inmarsat is properly identified as a real-party-in-interest. The Applications here are fundamentally incomplete.

B. The Parties Do Not Challenge the Fact that Inmarsat Is Fully Financing the Transaction and Will Hold a Materially Pre-Paid Fixed Price Option

There can be no serious dispute that Inmarsat is the real-party-in-interest and will be acquiring *de facto* economic control over Stratos. Once the Stratos stock is acquired by CIP, Inmarsat will bear the economic risk of Stratos through its loan to finance the acquisition, and will control the fate of the company through its fixed price, assignable Call Option. 9/

The transaction parties do not disagree that Inmarsat is funding the acquisition through a Loan Facility that is not on commercial terms. The loan contains below-market interest rates with interest not payable until the expiration of the contracts limiting Inmarsat's ability to acquire a distributor of its services. The loan terms then become progressively more onerous until Inmarsat acquires *de jure* control. *See* VIZADA Petition at 9-12.

Nor do the parties dispute that Inmarsat holds an assignable Call Option that permits it to acquire all of the stock of Stratos for no more than $1 million at any time after April 2009 (or even earlier if the private contractual restrictions discussed above are eliminated). 10/ Together, the Credit Facility and the Call Option place all material risk related to ownership of Stratos on Inmarsat, while fixing the price at which Inmarsat can acquire *de jure* control later at a relatively trivial level. 11/

9/ Indeed, Inmarsat is bearing all the pre-closing risk through its loan. *See* VIZADA Petition at 21 n. 79 (Inmarsat loan to CIP covers not just the payments to Stratos shareholders for their stock, but also all the "fees and expenses of the transaction") (*citing* Inmarsat Investor Conference Transcript at 3); *see also* Facilities Agreement dated 11 June 2007 for CIP UK Holdings Limited, CIP Canada Investment Inc., and Inmarsat III Limited, Section 3.1(a)(ii) ("Facilities Agreement").

10/ *See* Communications Investment Partners Limited and Inmarsat Finance III Limited, Call Option Agreement made on 19 March 2007, Section 3.1 ("Call Option Agreement").

11/ The Call Option Agreement may not be assigned by CIP, yet Inmarsat Finance may assign its rights without CIP's consent, to any party, whether or not qualified to control a

CIP has now filed copies of the Loan Facilities Agreement and Call Option Agreement with the Commission, with unredacted copies made available pursuant to the *Protective Order* issued on July 20, 2007. 12/ The terms of the Loan Facilities Agreement and Call Option Agreement make clear they are not those that an independent party would be expected to agree to outside the context of a deal where Inmarsat is seeking to ensure its immediate control of the target, Stratos. And, as anticipated in the VIZADA Petition, the terms of these Agreements vitiate the purported insulation by the trust, which is, after all, an insulation between CIP and the holder of the Stratos voting rights, not an insulation between Inmarsat and Stratos management. For example, VIZADA stated in the Petition: the "Loan Facility probably gives Inmarsat Finance rights to review Stratos' records." VIZADA Petition at 12. Low and behold, it does just that: Inmarsat is to receive quarterly and annual consolidated balance sheets and statements of Stratos' operations and cash flow, 13/ and, each year, an "Annual Business

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Commission licensee, save for a restriction on assigning to certain other Inmarsat affiliates before the call option is exercisable. *Id.*, Section 14.2.

12/ *See Protective Order,* DA 07-3344 (IB rel. Jul. 20, 2007) (the "*Protective Order*"). The undersigned counsel each completed and submitted an Acknowledgment of Confidentiality as provided in the *Protective Order.* It is noted that the unredacted Agreements reference and incorporate the terms of yet another document which has neither been provided to the Commission nor has been made available to the objecting parties. That document, the existence of which was masked in the redacted documents, [redacted] The Commission should require that this document too be made available to it and commenting parties. VIZADA reserves the right to supplement the record after it receives access to this additional document.

13/ Facilities Agreement, Schedule 10, Section 3(a), (b). This data is to be provided on a consolidated basis for Stratos, CIP Canada and CIP-UK. However, given that the CIP entities are brand new holding companies with no business interests other than to hold the Stratos stock, the consolidated data necessarily will be reflective solely of Stratos' business operations. The CIP entities specifically represent in the Facilities Agreement that they are – and will remain –

Plan" with detailed forecasted balance sheets, income statements and statements of operations and cash flow. 14/ Furthermore, Inmarsat Finance is free to share any of this information with its affiliates. 15/

The redactions made by CIP to the two provided Agreements are curious, at best. [redacted] 16/ And other redactions were made to specific financial terms that are already in the public domain through the *Narrative* to the Applications or the *Proxy Circular*, and thus are no longer confidential. 17/ More troubling, other redactions appear to have as their only

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only holding companies for Stratos with no other liabilities or commitments, present or future. *Id.*, Sections 19.1, 19.7.

14/ *Id.*, Schedule 9, Definitions, and Schedule 10, Section 3(f).

15/ *Id.*, Section 28.7(a) ("The Lender may disclose to any of its Affiliates...any information about any Obligor, the Group and the Finance Documents as the Lender shall consider appropriate.").

16/ It is neither unusual, nor a proprietary trade secret, that a stockholder subject to a call option agrees [redacted] Nor is it unusual or proprietary that a borrower agrees [redacted] However, one can understand why Inmarsat and its transaction partners are sensitive to these points in the overall context of this matter. An option with these terms by itself may not constitute *de facto* control prior to exercise. But together with all of Inmarsat's other levers and powers outside the Call Option, they underscore how completely Inmarsat has cemented its influence over Stratos to accompany its full economic position. [redacted]

17/ For example, the *Proxy Circular* discloses: "Upon exercise of the Call Option, Inmarsat Finance will pay CIP an exercise price of between US$750,000 and US$1,000,000." *Proxy*

sensitivity that the redacted terms further cement Inmarsat's control over CIP and Stratos. 18/

Specifically, Inmarsat's tight rein is evidenced in redacted Facilities Agreement terms such as: [redacted]

Circular at 35. Yet, redacted from the Call Option Agreement [redacted]

18/ Hence, the Commission should closely scrutinize whether to continue to afford confidential treatment to these documents, let alone allow their treatment as copy-prohibited. CIP's request for confidentiality is not in the public record and has not been made available to parties pursuant to the *Protective Order*. However, a review of the redacted documents does not appear to support CIP's claim in most instances of the need for confidentiality over the redacted provisions of the Agreements. VIZADA reserves the right to oppose CIP's request for confidentiality once that request is made available and depending on the extent to which the parties "over-redact" documents as this proceeding continues.

19/ [redacted]

[redacted] 20/

Inmarsat's response to VIZADA pointing out the influence and control granted Inmarsat via the Call Option and Facilities Agreement is simply to assert that "Commission review should not involve the relationship between the grantor and beneficiary of the Trust (CIP Canada) and its parent's lender (Inmarsat Finance)." Inmarsat Opposition at 4. Inmarsat makes no material effort to explain why it would extend the non-market financing but for its related option to acquire Stratos itself. 21/ It gives no examples of other instances where it has funded major acquisitions for third parties. And as for the below market rate, Inmarsat rationalizes that this "is effectively additional consideration" to CIP for the option. Inmarsat Opposition at 10. But this theory ignores the fact that CIP will not even be paying the interest during the pre-April 2009 period before the option is expected to be called. And more fundamentally, any such "additional consideration" is trivial in comparison to the overall value of Stratos. 22/

20/ [redacted]

21/ To further ensure that Inmarsat will acquire *de jure* control of Stratos when it desires, if CIP were to rescind or attempt to repudiate the Call Option Agreement (or any of the other transaction agreements to effectuate the acquisition of Stratos), that would constitute a breach of the Facilities Agreement, permitting Inmarsat to demand immediate re-payment of the loan. *See* Facilities Agreement, Section 26.3. Moreover, the terms of the Facilities Agreement ensure that the CIP principals cannot reap any financial upside while holding Stratos: CIP is forbidden to declare any cash dividend or distribution (other than internal distributions). *Id.*, Schedule 11, Section 7(a)(i).

22/ Inmarsat also points to other elements of the loan and option that, ironically, also underscore the non-market basis of the financing, and the control they give Inmarsat over the fate of Stratos. For example, Inmarsat notes that CIP cannot put Stratos to Inmarsat. *See* Inmarsat Opposition at 10. But this limitation on CIP does not reduce the power of Inmarsat's call right or the extent to which Inmarsat bears the economic risk of Stratos through the loan facility; if anything the absence of a put makes the call right more valuable by further restricting CIP's

Inmarsat does not refute the fundamental fact that, in the context of this transaction, the financing arrangement (a) funds payoff of the current Stratos owners, without recourse to the nominal borrowers (CIP) now, and (b) burdens CIP to ensure that it will have an additional reason to follow through with the *de jure* transfer of the Stratos shares to Inmarsat later when the Call Option is exercised.

Stratos similarly does not challenge the basic facts VIZADA has noted concerning the Loan Facility and Call Option. 23/ But Stratos argues that at most the financial arrangements give Inmarsat "control over CIP and an economic interest in Stratos." 24/

VIZADA agrees that, under Commission precedent, Inmarsat has *de facto* control over CIP. It is worth noting that neither Inmarsat nor Stratos, nor for that matter CIP itself, challenge the observation that the CIP principals themselves have no material equity or other financial stake in CIP. 25/ Nor do the parties challenge the observation that Inmarsat is guaranteeing CIP's performance in the Arrangement Agreement for the acquisition of the Stratos

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power. Inmarsat observes that it can sell its call option. *Id.* But leaving aside the likelihood of this occurring, it is Inmarsat who will reap the economic value of Stratos at that time based on the sale price of the option, choose the buyer, and control the deal economics through any renegotiation or replacement of the loan facility.

23/ Stratos simply suggests that some facts could be wrong, but does not identify any specific examples. Stratos Opposition at 15.

24/ *Id.* CIP itself does not even discuss the Loan Facility. It is noteworthy that Inmarsat and CIP believe that CIP can control Stratos, as CIP [redacted]

25/ *See* VIZADA Petition at 16. The lack of financial stake by CIP's principals is also similar to those situations where the Commission has found a loan to be the equivalent of an equity investment in the alien ownership context. *See, e.g., Fox Television Stations, Inc.*, 11 FCC Rcd 5714, 5721 [¶ 17] (1995) (deeming a loan to be an equity capital contribution where there was a high debt/equity ratio, explaining that "with that little equity supporting such a huge debt, it seems clear that debt repayment will actually depend on the ultimate success of the venture, a hallmark of risk capital."). Thus, it is really Inmarsat, not CIP, that would be the true beneficial owner of Stratos under the trust, yet the trust does not impede Inmarsat's control over, and communications with, Stratos management.

stock. *See* VIZADA Petition at 21.

However, Inmarsat's relationship to CIP is just a piece of a larger puzzle, one that (once assembled) demonstrates that Inmarsat is the real-party-in-interest and would enjoy *de facto* control over Stratos itself if the transactions are allowed to proceed as proposed.

C. The Trust Will Not Prevent Inmarsat from Communicating with Stratos, and Exercising Influence and Control Over the Company, Particularly Given Inmarsat's Role as the Company's Major Vendor

The basic argument of both Inmarsat and Stratos is that CIP itself does not have control over Stratos, and thus, Inmarsat cannot control Stratos through CIP notwithstanding all of the Inmarsat-CIP arrangements. 26/ The parties repeatedly reference a so-called (and self-labeled) "firewall" between the Trustee and CIP as if this was absolute and somehow answered all questions. It does not.

First of all, clearly the Trustee himself does not believe he will exercise operational control over Stratos. He has expressly disclaimed this power and intention, pointing to Stratos management. *See* Franklin Opposition at 4. CIP takes the same position, agreeing that neither CIP itself nor the Trustee will control the post-sale Stratos. *See* CIP Opposition at 6. These parties are prudently aware that they do not qualify as control parties under the Commission's policies and rules and the Communications Act, and that it would be improper to hold themselves out to the FCC as such. Rather, they are only passive holders of the Stratos stock, for the benefit of Inmarsat upon exercise of its option at the pre-negotiated price and on the already established terms. 27/

26/ *See* Inmarsat Opposition at 9; Stratos Opposition at 15-16.

27/ This role would be permissible if Inmarsat itself was approved as a transferee of Stratos under Section 310 of the Act and related Commission procedures. But CIP and the Trustee are left exposed so long as Inmarsat refuses to present itself to the Commission as the real-party-in-

And second, simply because Inmarsat may exercise de facto control over CIP does not mean that it will not also exercise *de facto* control directly over Stratos pursuant to these transactions. 28/ The parties point to the Trust Agreement as if that document prevents such control, but it does not – especially in these particular circumstances where Inmarsat is the primary wholesale supplier to Stratos and therefore will be routinely involved in the heart of the Stratos business.

In fact, the Trust Agreement does not interfere with such Inmarsat-Stratos dealings in any material respect. If anything, the Agreement helps assure that the lines of communication between Inmarsat and Stratos stay clear and unburdened by actions of CIP or the Trustee. 29/ For example, Stratos observes that Section 10(c) of the Trust Agreement precludes CIP from communicating with the Trustee. Stratos Opposition at 12. But that limitation does not prevent direct Inmarsat-Stratos communications. Nor is it a particular burden that the Trustee is precluded from communicating with Inmarsat concerning Stratos operations given that the Trustee has made clear he will not be involved in them.

Somewhat more relevantly, Stratos also cites to Section 4(b) of the Trust Agreement, which purports to contain a limited restriction on certain Stratos directors communicating with Inmarsat or CIP. *See* Stratos Opposition at 12. But this provision provides no material barrier – let alone the mythical "firewall" against communications between Inmarsat

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interest.

28/ Thus, even if it were correct that CIP cannot influence the Trustee or Stratos, this would not preclude Inmarsat from influencing Stratos independently from CIP, leaving CIP to play only the role of interim holder of the Stratos shares pending Inmarsat's exercise of the option.

29/ It is noteworthy that, notwithstanding that Inmarsat Finance is not a party to the Trust Agreement, it approved the form of agreement prior to its execution. *See* Facilities Agreement, Schedule 2, Section 2(a) (form of Trust Agreement "approved by the Lender on 19 March 2007").

and Stratos related to Stratos operations.

First, the provision's reach is very limited. It only would apply to a Stratos director who is appointed by the Trustee, and only if the director agrees to the limitation. *See* Trust Agreement at Section 4(b). Nothing suggests that the Trustee actually will be replacing any of the current Stratos directors, thereby triggering the provision. To the contrary, the Application *Narrative* states, and the Oppositions confirm, that the Trustee plans to retain current Stratos management. 30/

Furthermore, the communications provision would not materially restrict any Stratos director who is also a Stratos officer. As Stratos acknowledges, such officers remain free to communicate routinely with Inmarsat regarding "commercial matters in the ordinary course of business." Trust Agreement, Section 4(b). But those are exactly the matters where Inmarsat will have the incentive to influence Stratos actions given that, by virtue of the financial arrangements of this deal, Inmarsat will own the material economic stake in the outcome of such actions.

And finally, no barrier at all will exist regarding communications between Inmarsat and any other Stratos officer or employee who is not a director. Indeed, neither Stratos nor any existing director or officer of Stratos is a party to the Trust Agreement. It follows that while CIP and the Trustee will not be talking about Stratos operations, Inmarsat and Stratos will be doing so routinely all the time.

Stratos's response is that the "ordinary course of business" provision applicable to director-officers is intended to permit "the regular communications between satellite operator and major distributor that Inmarsat and Stratos have had for the last fifteen years," and that it is not "realistic" to prohibit them. Stratos Opposition at 13. Presumably Stratos has the same view

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30/ *Narrative* at 10-11; Stratos Opposition at 15; CIP Opposition at 6.

regarding the completely unrestricted communications between Inmarsat and "non-director-level" Stratos officers and employees (and the directors not appointed by the Trustee) that are subject to no communications restrictions at all. Stratos peculiarly then asserts that such "communications will not give Inmarsat control over Stratos any more than Inmarsat controlled Stratos, VIZADA or TSS previously, or will control VIZADA or TSS in the future." *Id.*

But of course up to now Inmarsat has not had any financial interest in Stratos, let alone all material financial interest. Up to now Inmarsat has not had a call option that allows it to take *de jure* control over Stratos at a nominal fixed price. Thus, up to now Inmarsat has not had the incentive to exercise *de facto* control over Stratos.

All this would change under the proposed transaction. At that point Inmarsat would have the incentive to favor Stratos in its wholesale dealings, and to communicate with and influence Stratos management regarding future actions. 31/ And Stratos management will have every incentive to be influenced by Inmarsat because they will know that Inmarsat already owns all of the economics of their company through the pre-paid option, and that they very likely soon will be direct employees of Inmarsat themselves. They will have little to gain from pleasing the Trustee, who will be deferring to them anyway. They will have little reason to please CIP, who has ceded the economics of Stratos to Inmarsat through the fixed price option. They will be listening to Inmarsat, and Inmarsat in turn will have the incentive and ability to influence

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31/ VIZADA recognizes that Inmarsat will continue to have contractual obligations limiting its ability to discriminate in favor of Stratos with respect to distribution and service matters until April 2009. Even assuming compliance, Inmarsat still will have incentives to prepare for the post-April 2009 period in advance.

More fundamentally, however, *de facto* control analysis does not turn on how a party will use that control – for good or ill, by action or omission. Rather, Section 310 of the Communications Act requires prior FCC approval of the transfer of control itself. And Inmarsat clearly is the real-party-in-interest to such a transfer here.

them. 32/

CIP argues that Inmarsat will have no incentive to harm Stratos because if the company declines in value, "Inmarsat would end up having in effect over bid on a declining asset." CIP Opposition at 6 n.13. But the converse is also true; as the economic owner of Stratos, Inmarsat will have incentives to favor Stratos so that the asset will increase in value, both on a stand-alone basis but more particularly as an element of the overall Inmarsat-affiliated businesses.

De facto control analysis involves a case-by-case review of the totality of the circumstances, and in this case the combination of levers that Inmarsat would hold would give it that power. 33/ It is not an answer for Stratos to point to cases where the Commission has found that financing, standing alone, does not necessarily constitute *de facto* control. 34/

32/ Stratos claims that Inmarsat's influence over management will be impacted by the terms of their compensation plan. Stratos Opposition at 19. But there is no reason why Inmarsat's incentives with regard to its *de facto* financial ownership of Stratos are inconsistent with those of management; to the contrary, upon closing those interests are largely aligned.

33/ *Lockheed Martin Corp. Regulus, LLC and COMSAT Corp.*, 14 FCC Rcd 15816, ¶ 30 (1999).

34/ Stratos Opposition at 45. Stratos cites *Seven Hills Television Company*, 2 FCC Rcd 6867 (1987) in support; however, that case merely holds that financing alone is not enough to find *de facto* control. *Id.* at ¶ 46.

Similarly, Stratos's reliance on the NeuStar trust is entirely misplaced. *See* Stratos at 8. In that situation the Commission was not even considering the application of Section 310 because FCC licenses were not at issue. Furthermore, there the real-party-in-interest (Warburg, Pincus & Co.) presented itself to the Commission (as Inmarsat has declined to do here) so that it could be a party to the relevant proceeding. In that situation the Commission approved a specific trust structure to deal with a specific rule related to network administration. Significantly, part of that trust involved restrictions on communications between NeuStar and Warburg affiliates as well as strong non-discrimination requirements. Here, as discussed above, communications between Inmarsat and Stratos would flow without material impediments. And finally, the fundamental involvement of Warburg itself was as a financial investor. In contrast to Inmarsat, Warburg had no intention of integrating NeuStar operations with those of its other portfolio investments. *See Request of Lockheed Martin Corporation and Warburg Pincus & Co. for Review of the Transfer of the Lockheed Martin Communications Industry Services Business*, 14

Nor is it an answer for Stratos to point to Commission's Tender Offer Policy – as Stratos does – and claim that any trust agreement meeting that Policy's terms by definition answers the *de facto* control question. Stratos Opposition at 21, 23. The Commission has never said such a thing, and the context here is completely different from a contest for control that the Tender Offer Policy is meant to address. Perhaps the Trust Agreement adequately insulates CIP from the Trustee. But it does not prevent Inmarsat from influencing Stratos directly. 35/

VIZADA already has discussed other situations where the Commission has found an unauthorized real-party-in-interest where a party loaned substantially all of the acquisition funds and held an option to take *de jure* control later. *See* VIZADA Petition at 16-21. Inmarsat and Stratos try to avoid the import of these cases by suggesting that they only deal with attribution questions and not control. This is incorrect and misstates VIZADA's point. The Commission has found an unauthorized transfer of control when, inter alia, the real-party-in-interest loaned almost all of the acquisition funds for a licensee to a purportedly in-control third party and obtained an option from that party with a very small payment due at exercise. 36/ That is what is happening here.

Attribution case law is relevant as an additional example of how the Commission has recognized that both debt and equity are material to evaluating a party's influence over and economic position in a Commission licensee. The Commission has deemed minority equity and debt positions to have regulatory implications in various attribution contexts even falling short of control. Here, the parties have conceded through silence that Inmarsat is the only significant

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FCC Rcd 19792 (1999).

35/ Since Stratos and Inmarsat can communicate directly, it is not true, as Stratos claims, that Inmarsat "can at most have access only to the information that CIP itself has." Stratos Opposition at 17.

36/ *See id.* at 19-20 (discussing *Edwin L. Edwards*, 16 FCC Rcd 22236 (2001)).

contributor to the CIP balance sheet, with the CIP principals having no material risk in either the upside (due to the fixed priced option) or downside (due to the lack of recourse in event of default of the loan) of the operation of Stratos, the parent of the Commission licensees. There is little doubt that if this scenario were presented to the Video Division of the Media Bureau of the Commission that it would not be tolerated – not because an attribution policy would cause a violation of a media ownership rule, but because Section 310 of the Communications Act requires the real-parties-in-interest to present themselves to the Commission. The same underlying principles underscore the relevance – for real-party-in-interest analysis – of considering carefully the influence of a party like Inmarsat when it supplies all of the financing, holds a largely pre-paid (fixed-price) option, and in this case has the incentive and ability to communicate with and influence the licensee.

The Commission's familiarity with Inmarsat is not a basis for allowing the company to side-step Section 310. The statute cannot be waived. In order to do its job, the Commission must depend upon a real-party-in-interest coming forward to seek advance consent for transfers of control. This is true whether that party is already a Commission licensee, or instead is a party with whom the Commission has not had prior dealings. The arguments in the Oppositions, if adopted, would have significant consequences for the future, undermining enforcement of key national policies reflected in the Communications Act. Unknown third parties, including those from non-WTO countries, or those potentially presenting national security or other public interest concerns, could obtain economic ownership and control over a Commission licensee without the review required by Section 310. 37/

37/ In this case, at a minimum, Inmarsat is evading public interest review of competitive issues presented by the transaction. It may also be evading national security review. In that

The Commission should not allow Inmarsat to do what others may not. It should direct Inmarsat to file an application disclosing (and defending) its proposed acquisition of control of Stratos. The Communications Act requires no less.

D. The Fact that Inmarsat Will Take *De Jure* Control of Stratos Later Does Not Obviate the Need for Inmarsat to Obtain FCC Approval to Take *De Facto* Control Now

Finally, Inmarsat and Stratos also try to make two somewhat inconsistent arguments. On the one hand, they repeatedly stress that the FCC will have another opportunity to review this transaction when Inmarsat exercises its option and takes *de jure* control of the Stratos shares. Stratos Opposition at 20; Inmarsat Opposition at 27. The implication is that the Commission can ignore what is happening here because come April 2009 it will have an opportunity to review the transaction for compliance with the law and the public interest. Of course, this theory could read the restriction on unauthorized *de facto* transfers of control out of the statute, at least in similar "equity/debt plus option" cases. 38/

On the other hand, Inmarsat and Stratos occasionally suggest that Inmarsat may never seek *de jure* control. *See* Stratos Opposition at 20-22; Inmarsat Opposition at 7 n.5. As a factual matter one can be properly skeptical of this claim given that the entire deal is driven by Inmarsat, and by its desire to acquire this distributor of its services. But the argument also is

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regard, the FBI has indicated that it has been in contact with "the Applicants" in connection with the review of the transaction in conjunction with the Department of Justice and Homeland Security. *See* Letter of Elaine Lammert, FBI (June 29, 2007). It is unclear whether Inmarsat is participating in those discussions as if it were an "applicant." If so, that would further underscore that Inmarsat is a real-party-in-interest. If not, this would demonstrate even more why the Commission must insist that real-parties-in-interest appear formally as applicants under Section 310. Next time the real-party-in-interests may lie deeper in the weeds.

38/ It is worth noting in passing that the parties chose not to address whether they would view the second step of their transaction as subject to the clearance requirements of the Hart-Scott-Rodino Antitrust Improvements Act. *See* Vizada Petition at 23 n.82.

irrelevant to the present application. Section 310 requires the Commission to decide, as Stratos itself put it, who will be in control of the transferee now. *See* Stratos Opposition at 20-21. The answer, as shown by the history of the parties' actions and the documents revealed to date, is that Inmarsat is the real-party-in-interest here and cannot avoid requesting Commission consent to take *de facto* control of Stratos.

II. THE TRANSACTION PRESENTS MATERIAL PUBLIC INTEREST QUESTIONS, BUT THE COMMISSION NEED NOT ADDRESS THEM UNTIL THE PARTIES MAKE A PROPER FILING UNDER SECTION 310

A. The Only "Public Interest" Claims Prematurely Relate to Acquisition of Stratos by the Alleged Non-Party, Inmarsat

Because the Applications are defective for failure to identify Inmarsat as a real-party-in-interest, they should be dismissed. The Commission does not need to reach the question of whether the proposed transaction satisfies the public interest standard mandated in the Communications Act.

Significantly, the parties themselves do not provide a valid public interest justification for the transaction they describe – one where they claim Inmarsat is not acquiring control of Stratos. The parties only point to their own private interests. For example, according to Stratos the public interest benefit here is that its owners will be able to accept the highest bid for their stock and exit. Stratos Opposition at 6. But Stratos does not explain why the interests of its current shareholders coincide with those of the public.

Similarly, Inmarsat claims that the public interest is served by this transaction because – while Inmarsat asserts that it is not taking control of Stratos now – it is preventing anyone else from doing so either. 39/ But even taking Inmarsat's rhetoric at face value, locking

39/ Inmarsat Opposition at 26 ("Approving this transaction ensures that Stratos will remain

up Stratos in this first step with the trust and CIP benefits only Inmarsat's own private interest, not the public. In other words, where is the transaction-specific public interest benefit in the supposed transfer of control of Stratos to CIP and the Trustee independent of Inmarsat? None is suggested.

Quite the contrary, to the extent that Inmarsat suggests any other public interest basis for the Applications, that rationale relates to the transfer of control of Stratos to Inmarsat itself – the transfer that the parties claim is not occurring here, and may never occur. Of course, Inmarsat cannot have it both ways; if the Commission is supposed to ignore Inmarsat's post-closing role and treat it as a non-party, then arguments as to why Inmarsat's acquisition of Stratos allegedly serve the public interest are irrelevant here. 40/

For now the Commission does not need to sort this confusion out. It should dismiss the Applications and require Inmarsat to appear as the control party that it is. At that time Inmarsat can make whatever public interest argument it can, and the Commission can evaluate those claims pursuant to its standard processes under Section 310.

B. When the Commission Receives an Application From Inmarsat, It Will Face a Complex Public Interest Analysis

VIZADA generally will hold further comment on this subject until Inmarsat

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independent until April 2009 and afterwards allows Inmarsat the possibility of acquiring Stratos"). As shown here, Stratos will hardly be "independent" – it will be under the *de facto* control of Inmarsat. But in any event, circumvention of Inmarsat's private contractual restrictions is hardly a valid "public interest" rationale under Section 310 and Commission precedent.

40/ Similarly, and tellingly, the only public interest benefit cited by CIP is to echo Inmarsat's own claim that vertical integration of Inmarsat and Stratos somehow fosters the goals of the Open-Market Reorganization for the Betterment of International Telecommunications Act. *Compare* CIP Opposition at 5 *with* Inmarsat Opposition at 26-27. CIP does not explain why the transaction, and its own role, otherwise meets the public interest requirements relevant to Section 310.

makes its own application. However, the Commission should not take that limited response for acceptance of Inmarsat's argumentation as to why the public would benefit from its taking control of Stratos. Quite the contrary, Inmarsat has good reasons for not wanting to come before the Commission here.

First, the Commission should not give weight to Inmarsat's misleading rhetoric regarding the commercial restrictions that prevent it from acquiring control of Stratos today. 41/ As all parties agree, including Inmarsat, the Commission is not the forum to address contractual matters. Suffice it to say that the restrictions were negotiated for sound commercial reasons, as part of broader agreements, and carry value today for Inmarsat distributors and their customers. Further negotiations will occur in advance of the expiration of the agreements in April 2009. In the meantime, the Commission should not allow Inmarsat to side-step the requirements of the Communications Act simply so that the company can achieve the material economic and other benefits prohibited it by contract. The Commission must dismiss these Applications and leave Inmarsat to resolve the situation. If that means that Inmarsat must wait to acquire Stratos, or must renegotiate its agreements (or indeed if Inmarsat breaches its agreements), none of that is the Commission's concern.

Second, Inmarsat is far too glib when it argues that its acquisition of control of

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41/ For example, Inmarsat claims that denial of the Applications will preserve an "inefficient distribution system" that former Signatories established to give "special privileges and artificial protection from competition" to "gatekeeper" distributors. *See, e.g.*, Inmarsat Opposition at 2, 24-25. For all this heated rhetoric, we would simply observe that the distribution agreements were commercially negotiated as a central element of the Inmarsat privatization, that VIZADA itself is not a former signatory, and that as a party to the Inmarsat commercial agreements it is improper for Inmarsat to try to draw the Commission into a debate over the import of terms to which Inmarsat itself agreed. Furthermore, it is ironic for the operator of the world's largest mobile satellite fleet to call resellers of its service "gatekeepers" given resellers' dependence on Inmarsat for the value-added services that they offer.

Stratos is a vertical transaction that is "*presumptively pro-competitive.*" *Inmarsat Opposition at* 16. This is a gross overstatement. While it is true that many vertical transactions create pro-competitive efficiencies, antitrust authorities have made clear, contrary to the suggestions of Inmarsat, that "vertical merger enforcement involves the same weighing of potential harms against possible efficiency gains as horizontal enforcement." 42/

The present transaction is no exception. The theory of competitive harm alleged by VIZADA – often called "input foreclosure" – is plainly recognized by case law and contemporary academic literature. 43/ Indeed, Inmarsat's own authorities explicitly recognize this harm and suggest that vertical combinations in networked industries, such as the telecommunications industry, are particularly susceptible to such anticompetitive harms. 44/ Furthermore, contrary to Inmarsat's suggestions, the principal competitive harm presented by input foreclosure is not the injury done to distributors, but potential output reductions and increased prices for consumers due to a reduction in downstream competition. 45/ Accordingly, VIZADA's foreclosure concerns are well within the ambit of competition law.

The academic literature cited by Inmarsat also lends no support to its arguments

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42/ Steven Sunshine, "Vertical Merger Enforcement Policy," Address before the American Bar Association at 15, April 5, 1995 (also reiterating that "[v]ertical merger enforcement is an important part of the [DOJ's] merger policy") ("*Vertical Merger Enforcement Policy*"). Although citing Mr. Sunshine's address itself, Inmarsat does not acknowledge, much less rebut, these statements regarding competition risks from vertical integration. *See* Inmarsat Opposition at 16 n.48.

43/ *See, e.g, In re Merck* & Co., 127 F.T.C. 156 (1999); M. Howard Morse, *Vertical Mergers: Recent Learning*, 53 Bus. Law 1217 (1998); Riordan and Salop, 63 Antitrust Law Journal 513, 528-557 (1995); *Vertical Merger Enforcement Policy* at 8-11 (describing foreclosure theory and discussing its application to recent DOJ enforcement actions).

44/ *Vertical Merger Enforcement Policy* at 5.

45/ *Id.* at 11 (describing competition concerns regarding a vertical merger between AT&T and McCaw in 1995, which could have resulted in input foreclosures, leading to an output reduction in the cellular services market).

regarding the "presumptive pro-competitive" nature of vertical transactions. In fact, the Riordan and Salop article (Inmarsat Opposition at 16-17 & n.50) spends almost twenty-five pages detailing the potential anticompetitive effects of input foreclosures. 46/ Specifically, Riordan and Salop argue that:

> By raising their input costs or otherwise excluding downstream rivals, an integrated firm can place downstream rivals at a cost disadvantage in the downstream market. Other input suppliers may not take up the slack because, for example, their ability to expand is limited, their effective market power has increased, or the input foreclosure itself facilitates coordinated pricing among input suppliers.... In these cases, if downstream rivals' costs are raised, the integrated firm may be able to effect an exercise of market power in the downstream market, either unilaterally or through coordination with its competitors. *Id.* at 528.

This is precisely the type of harm likely to occur under the present transaction. By increasing prices or reducing access to Inmarsat services, Inmarsat and Stratos can exclude rivals and exercise undue market power on downstream distributors.

In addition to assuring the Commission that it does not intend to foreclose access to Stratos' rivals, Inmarsat also argues that such a foreclosure would be perfectly legal. This is not true. Inmarsat has rested much of its argument regarding foreclosures of downstream distributors on cases involving *unilateral* actions under Section 1 of the Sherman Act. 47/ These are mystifying citations, as the present case involves a *multilateral* transaction. Nonetheless, Inmarsat appears to be arguing that actions it could unilaterally take under Section 1 are, *a fortiari*, legal and create "no competitive concerns" under other competition laws in a

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46/ *See* Riordan and Salop, 63 Antitrust Law Journal at 528-557.

47/ Inmarsat Opposition at 22 n.59, *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

multilateral context. 48/ In fact, the cases it cites stand for the widely accepted principal that unilateral actions are simply not within the scope of Section 1, which regulates "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C.A. § 1. This is axiomatic to antitrust law under Section 1, but it is wholly irrelevant to the present case. Moreover, even if this were a unilateral action and only the Sherman Act applied, a party may be liable for unilateral refusals to deal under Sherman Act Section 2. 49/ It therefore is simply a misstatement of the law to baldly claim that "a business 'generally has a right to deal, or refuse to deal, with whomever it likes.'" 50/

Inmarsat's citation of Sherman Act case law in the Second Circuit regarding bilateral distribution agreements at least is more relevant to the present transaction, but also is

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48/ *See* Inmarsat Opposition at 22 (emphasis in original):

> Yet the *only* potential effects VIZADA has identified are those that could occur regardless of this transaction. There would be no competitive concerns even if Inmarsat altered its distribution absent this transaction, and VIZADA has no good explanation for why there should be concerns (assuming *arguendo* that it happens) with this transaction.

49/ *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that a refusal to deal with an existing distributor of ski lift tickets may constitute a violation of the Sherman Act Section 2); *Verizon Communications v. Law Offices Of Curtis Trinko*, 540 U.S. 398 (2004) (upholding *Aspen*, but limiting it to cases in which two parties have a prior, profitable course of dealing). A unilateral refusal to deal by Inmarsat could fall well within the bounds of *Aspen Skiing*, but VIZADA is certainly not limited by unilateral theories under Sherman Act Section 2. Input foreclosure is also recognized by enforcement authorities under Section 5 of the FTC Act, Clayton Act Section 7, and FCC precedent. *See, e.g, In re Merck* & Co., 127 F.T.C. 156 (1999) (finding that the formation of Merck-Medco may result in an increase in rival drug manufacturers' costs of distribution by restricting needed inputs); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., from Adelphia Communications Corporation to Comcast Corporation, from Comcast Corporation to Time Warner Inc., and from Time Warner Inc. to Comcast Corporation*, 21 FCC Rcd 8203, 8238 (2006).

50/ Inmarsat Opposition at 22. This quote from *Monsanto Co. v. Spray-Rite Service Corp.* was limited strictly to unilateral actions under Sherman Act Section 1; it has no relevance in this context.

equally unavailing. As cited by Inmarsat, the court in *ECC v. Toshiba* noted that "i[t] is not a 'violation of the antitrust laws, *without a showing of an actual adverse effect on competition market-wide*, for a manufacturer to terminate a distributor ... and to appoint an exclusive distributor." 51/ VIZADA contends that this transaction will result in actual adverse effect on competition market-wide; it does not suggest that this is a *per se* violation of Sherman Act Section 1, and so its arguments are wholly consistent with *ECC v. Toshiba*.

Again, the Commission does not need to consider the public interest questions presented by Inmarsat's acquisition of control of Stratos until Inmarsat properly files an application for consent to do so. But when it does, it will find that the issue is complicated, with serious implications for mobile satellite service customers.

51/ *ECC v. Toshiba America Consumer Products, Inc.*, 129 F.3d 240, 244 (2d. Cir. 1997) (emphasis added).

CONCLUSION

For the foregoing reasons, and those presented in VIZADA's Petition to Deny, the Commission should reject the Applications based on the failure to disclose a real-party-in-interest as required by Section 310(d) of the Communications Act. In the alternative, the Commission should designate the Applications for hearing on this fundamental question.

Respectfully submitted,

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July 31, 2007

REDACTED – FOR PUBLIC INSPECTION

CERTIFICATE OF SERVICE

I, Cecelia Burnett, hereby certify that on this 31st day of July, 2007, I caused to be served a true copy of the foregoing redacted version of the "Reply of VIZADA Services LLC" by electronic mail or by first-class, postage-prepaid U.S. mail upon the following:

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